IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

W. DEVIER PIERSON
KNOX BEMIS
JAMES M. COSTAN
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

Counsel for Petitioner
United Gas Pipe Line Company

Of Counsel:

MICHELLE B. BOLTON
United Gas Pipe Line Company
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

PIERSON SEMMES CROLIUS AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

November 24, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. MCCOMBS, *et al.*,
Respondents.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. MCCOMBS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 570 F.2d 1376 and is printed in the Appendix. (App. 23.)[1] Opinion Nos. 740 (Pet. App. 1) and 740-A (Pet.

[1] The appendix in this case consists of two separate printed volumes: (1) the Appendix (tan cover) filed with the briefs on the merits in the consolidated proceeding and (2) the Appendix to

App. 46) of the Federal Power Commission are reported at 54 FPC 755 and 2034, respectively. Opinion No. 740-B (Pet. App. 70) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1978. (Pet. App. 94.) An order denying petitions for rehearing and suggestions for rehearing in banc filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission")[2] was entered on April 4, 1978. (Pet. App. 95.) United filed a timely petition for a writ of certiorari in this Court on July 3, 1978 in No. 78-17. By orders dated October 10, 1978, the Court granted United's petition and the petition of the Commission in No. 78-249, and consolidated the two cases. (App. 39, 41.) This Court has jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do the prerequisites for abandonment of Section 7(b) of the Natural Gas Act (*i.e.*, permission and approval of the Commission after due hearing and a prescribed finding by the Commission) apply to a producer's certificated service obligation if gas production

---

Petition for Certiorari (white cover) filed July 3, 1978 in No. 78-17, United Gas Pipe Line Co. v. Billy J. McCombs, *et al.* References to items contained in the Appendix for the consolidated proceeding will be cited as "App.," while references to items contained in the Appendix to Petition for Certiorari will be cited as "Pet. App."

[2] "Commission" is used herein to refer both to the Federal Energy Regulatory Commission and to its predecessor, the Federal Power Commission.

ceases from the reserves known to exist on the dedicated acreage?

STATUTES INVOLVED

Principally involved is Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> *Abandonment of facilities or services; approval of Commission*
>
> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Also involved is Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which, because of its length, is set out separately in the appendix attached to this brief.

Similarly, Section 2(18) and Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978[3] are also pertinent and, because of their length, are separately set out in the appendix to this brief.

STATEMENT OF THE CASE

A. Nature of the Case.

As in this Court's recent decision in *California* v. *Southland Royalty Co.*,[4] the issue here is whether a nat-

---

[3] Pub. L. No. 95-621, 92 Stat. 3350 (1978).

[4] 436 U.S. 519 (1978).

ural gas producer's certificated service obligation has terminated without Commission approval of abandonment pursuant to Section 7(b) of the Natural Gas Act. In this case, the court below held that when production ceased from the known reserves on the lease in question there was an abandonment even in the absence of Commission authorization, thus bypassing the Commission's authority to withhold or condition abandonment approval and foreclosing the rights of other parties to be heard on the issue.

B. Facts.

1. Butler B lease and 1953 gas purchase contract.

On May 20, 1948, W. R. Quin obtained an oil and gas lease (the Butler B lease), covering approximately 163 acres in Karnes County, Texas. (Ex. 17; R. 242, 495-500.) On April 29, 1953, Bee Quin, his widow, entered into a gas purchase contract with United, agreeing to sell to United the natural gas production from and attributable to certain leaseholds, including the Butler B lease.[5] (Ex. 1; R. 45-46, 53, 364-401.)

There was no depth limitation in the lease or in the contract. The contract accorded United the right to purchase the "merchantable natural gas . . . produced from all wells now or hereafter drilled during the term of this contract on the lands and leaseholds" covered by the contract. (R. 45-46, 365.) The primary term of the contract was ten years but by subsequent amendment dated February 7, 1961 was extended until February 7, 1981. (Ex. 1; R. 45-46, 53, 364-401.)

[5] By agreement dated September 7, 1954, the 1953 contract was amended to cover additional leaseholds, including the "Butler A lease" referred to in the opinion of the court below. (Ex. 1; R. 53, 364-401.)

2. Commission certification.

Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*,[6] Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing the sale of the natural gas covered by the 1953 contract in interstate commerce to United. (R. 46, 1123-38.) Her applications were granted by orders issued December 8, 1954 and December 14, 1954 in Docket Nos. G-2997 and G-2998, respectively. (R. 46.) United installed a gathering facility and an above-ground field measuring station on the Butler B tract and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin. (R. 46, 79-81, 206-07.)

3. Termination of production.

By a succession of transfers,[7] a group headed by Louis H. Haring became owner of the leasehold interest in the Butler B tract on March 1, 1966. (Ex. 15; R. 199, 455-67.) In April and May of 1966, Bay Rock Corporation, as operator for the Haring group, produced gas from the Butler B lease and sold it to United

[6] 347 U.S. 672 (1954).

[7] Among the successors to Mrs. Quin was H. A. Pagenkopf, Trustee. On June 19, 1963 in Docket No. G-12694, the Commission issued Pagenkopf a successor in interest certificate to continue the service initiated by Mrs. Quin. (R. 46-47; Pet. App. 5-6.) Contrary to the indication in the opinion of the court below (App. 28), the Commission's records in Docket No. G-12694 are intact. It is only the records in Docket Nos. G-2997 and G-2998 that were superseded by the successor in interest certificate in Docket No. G-12694 that are not available. (Pet. App. 30-35.)

pursuant to the 1953 contract. (R. 47, 201, 206-07.) On May 28, 1966, production ceased from the Butler No. 7 gas well, which was the only well producing gas on the lease at that time.[8] (R. 201, 206.) Thereafter, Bay Rock wrote United that the existing gas wells were depleted and that no other gas would be available at that time. (Ex. 3; R. 47, 54, 403; Ex. 30; R. 242, 576-77.) On December 7, 1966, United advised Bay Rock that it intended to remove its measuring facilities for use elsewhere on its system but that such equipment would be reinstalled "[i]f, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above captioned contract. . . ." (Ex. 4; R. 47-48, 55, 404; Ex. 31; R. 242, 578-79.)

Thereafter, no additional natural gas was produced from the Butler B lease until 1971. However, in August 1966, Bay Rock drilled a producing oil well, thereby keeping the Butler B lease in effect. (R. 201-02.)

In August 1968 and January 1971, letters from the Secretary of the Commission were sent to the producers advising them that if no further sales of gas were contemplated, it would be necessary for them to file applications to abandon service. (Pet. App. 97, 100.)[9] The producers, however, never attempted to secure Commission approval for abandonment, nor did they raise the issue with United. (R. 211-12.)

---

[8] United's records reflect that production did not cease until September 1966. (R. 47; Ex. 29; R. 242, 574-75.)

[9] The letters are not part of the record. They were, however, considered in the decision of the court below. (App. 28-29.)

Although Haring testified that after 1966 he considered that the 1953 contract terminated[10] (R. 202, 208-12), United continued to regard the contract as being in effect and administered it as such for purposes of its own records. (R. 48, 218-19.) Moreover, by letter dated June 23, 1969, United notified Haring that it would be willing to reset the price under the 1953 contract at 18.3¢ per Mcf for the five-year period beginning June 19, 1969, but that in the absence of current deliveries it had not prepared an agreement for this purpose. (Ex. 5; R. 55, 405.) The record reflects no response from Haring. (R. 219.)

4. New production.

In 1971 and 1972, Haring assigned his working interest rights in certain deep horizons underlying the Butler B lease to National Exploration Company ("NEC") and to the Respondents known as the McCombs Group. (R. 202-03; Ex. 22; R. 242, 514-29; Ex. 23, R. 242, 530-42.) In 1971 the new working interest owners discovered gas in these lower depths. (R. 203, 253-54.)

Thereafter, the McCombs Group contacted representatives of United in an effort to market the gas, and according to the testimony of United's witness, represented to United that none of the production involved was from dedicated acreage. (R. 89-90.) On November 19, 1971, United tendered a written offer of purchase, but noted in the transmittal letter that it had a gas purchase contract (the 1953 contract) which covered acreage in the area of the new well. Accordingly, it re-

---

[10] Haring also testified that when production ceased in 1966, he was unaware of any gas reserves at lower levels. (R. 203.)

quested the McCombs Group to advise it as to the manner in which the right to produce the gas in question had been secured. (Ex. 6; R. 49, 55, 406; Ex. 26, R. 242, 555-61.) United's records contain no evidence that the McCombs Group ever responded to this request. (R. 49, 97-98.) However, by title opinion dated December 7, 1971, the McCombs Group was itself advised that the Butler B tract was subject to the 1953 contract with United.[11] (R. 256-57; Ex. 28; R. 242, 567-73.) Nevertheless, by contract dated June 1, 1972, the McCombs Group sold the Butler B gas on the intrastate market to Respondent E. I. du Pont de Nemours & Company ("du Pont") for industrial consumption and informed United that the gas was no longer for sale. (R. 262-63; Ex. 35; R. 242, 627-60.)

In January 1973, NEC advised United that in the course of preparing division orders, it had discovered that the 1953 contract appeared to cover the land where the deeper production was located. (R. 50.) To determine the extent of its rights, United undertook a title search which was concluded on May 29, 1973. (R. 50.) By telegram dated June 6, 1973, United formally notified all appropriate parties, including du Pont, that in United's view sales of gas from the Butler B lease, other than sales to United, would constitute a violation

[11] United was not advised of the 1971 title opinion. (R. 283-84.) A prior title opinion dated March 6, 1967 and made available to the McCombs Group by Louis Haring contained no mention of United's 1953 gas purchase contract. (Ex. 25; R. 242, 550-54.) However, in conveying his interests to the McComb's Group, Haring did not include general warranties of title and freedom from encumbrances. (Ex. 23; R. 242, 530-42.)

of the 1953 contract.[12] (Ex. 7, R. 50, 55, 407-08.) Notwithstanding objection by United, the McCombs Group continued to sell all the new gas production attributable to the Butler B lease to Respondent du Pont in intrastate commerce.

C. Proceedings Before the Commission.

Acting on a complaint by United, the Commission in Opinion No. 740, issued August 20, 1975, found that the service under the 1953 contract had been initiated as authorized, so that production from the Butler B tract was dedicated to interstate commerce. (Pet. App. 1, 29-36.) The Commission held that, since there had been no abandonment under Section 7(b), the Butler B gas was required to be delivered to United and that the sales of gas in intrastate commerce were in violation of Section 7.[13]

D. Proceedings in the Court Below.

The McCombs Group and du Pont petitioned the United States Court of Appeals for the Tenth Circuit for review of the Commission's determination.[14] Pending review, the court stayed the effect of the Commission's order so that subsequent gas production from the Butler B lease has all been sold in intrastate commerce. (App. 21.)

[12] On August 2, 1973, the McComb's Group filed suit for declaratory judgment as to United's rights under the 1953 contract, which suit is currently in abeyance. McCombs v. United Gas Pipe Line Co., No. SA-73-CA-210 (W.D. Tex., filed August 2, 1973).

[13] In Opinion No. 740-A, issued November 7, 1975, the Commission denied rehearing. (Pet. App. 46.) On January 19, 1976, the Commission issued Opinion No. 740-B dealing with issues not involved in the instant proceeding. (Pet. App. 70.)

[14] Jurisdiction was based upon Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On October 18, 1976, the Tenth Circuit issued its initial decision in which it reversed the Commission.[15] (Pet. App. 81.) On petitions for rehearing by both United and the Commission, the court on May 2, 1977 granted rehearing (Pet. App. 92), and on October 18, 1977 withdrew and vacated its first opinion and judgment. (Pet. App. 93.)

On February 9, 1978, the court, with one judge dissenting, entered its opinion and judgment on rehearing reaching the same result as in its previous opinion. (App. 23; Pet. App. 94.) The majority held that since production had ceased in 1966 from all gas reservoirs then known to exist, "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission." (App. 31.) Judge Holloway dissented on the ground that the Section 7(b) procedures are mandatory.[16] (App. 34-37.)

In response to petitions by United and the Commission, this Court granted certiorari on October 10, 1978 and consolidated the proceedings. (App. 39, 41.)

SUMMARY OF ARGUMENT

A lawful abandonment of a gas producer's certificated service obligation under the Natural Gas Act is not effected simply by the fact that production ceases from the reserves known to exist on the dedicated acreage. Section 7(b) of the Natural Gas Act unambiguously provides that no abandonment is authorized

[15] McCombs v. FPC, 542 F.2d 1144 (10th Cir. 1976).

[16] On April 4, 1978, the court denied petitions by United and the Commission for rehearing and suggestions for rehearing in banc. (Pet. App. 95.)

without the approval of the Commission after due hearing and a finding by the Commission that the abandonment meets specified statutory tests. Section 7(b) requires, *inter alia,* that the producer show and the Commission determine that the reserves on the dedicated acreage are depleted—not merely that existing wells have ceased to produce.

The decisions of this Court—particularly *Sunray Mid-Continent Oil Co.* v. *FPC*[17] and *California* v. *Southland Royalty Co.*[18]—make it clear that the Section 7(b) abandonment requirements constitute a key element in the scheme of regulation established by the Natural Gas Act and that a certificated service obligation cannot be terminated without Commission authorization pursuant to Section 7(b). If a lawful abandonment could be had by the fact that gas production ceases, it would undermine the authority of the Commission to determine whether the producer had done all that was required to maintain production and whether there were reserves on the dedicated acreage other than those which had ceased to produce.

In enacting the Natural Gas Policy Act of 1978, Congress made clear its understanding that the termination of production does not alone effect abandonment. Special provisions of that Act[19] exempt previously dedicated gas from further jurisdiction of the Commission under the Natural Gas Act if such gas was not being sold in interstate commerce on May 31, 1978 *and* on that date neither the person who dedicated the gas

[17] 364 U.S. 137 (1960).

[18] 436 U.S. 519 (1978).

[19] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§ 2(18)(B)(iii), 601(a)(1)(A), 92 Stat. 3350 (1978).

to interstate commerce nor any successor in interest of that person had the right to sell the gas in question. This provision would be unnecessary if the termination of production alone effected abandonment under Section 7(b) of the Natural Gas Act.

Furthermore, the limited exclusion of the Natural Gas Policy Act of 1978 evidences Congress' clear intent that where, as here, a successor in interest of the person who originally dedicated the gas still holds the lease, the provisions of the Natural Gas Act, including Section 7(b), shall still apply. The Conference Reports accompanying the Natural Gas Policy Act of 1978 make that intent explicit stating that, where the successor in interest still has the right to produce the gas committed to interstate commerce by his predecessor in interest, "[t]he natural gas remains committed or dedicated to interstate commerce." [20]

The McCombs Group is in error in arguing that abandonment should be ordered retroactively as if it had been applied for and granted before the existence of new reserves was discovered. As in the case of the "*de facto* abandonment" theory adopted by the court below, this action would bypass the Section 7(b) requirements and undermine the Commission's authority with respect to certificated service obligations. Moreover, because a retroactive order is a corrective measure, it is not justified where, as here, the facts now known make it clear that the order sought to be entered would not be correct.

---

[20] H.R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 72 (1978); S. Conf. Rep. No. 95-1126, 95th Cong., 2d Sess. 72 (1978). The two reports are identical. The Reports' full discussion of the exclusion is included in the appendix attached to this brief.

ARGUMENT

I. The Ruling of the Court Below Is in Conflict With the Plain Terms of Section 7(b) of the Natural Gas Act and With the Decisions of This Court.

A. Section 7(b) Unambiguously Requires a Commission Hearing, a Specified Finding and Commission Approval Before Certificated Natural Gas Service Can Be Abandoned.

The terms of the statute are plain. Section 7(b) of the Natural Gas Act provides without qualification that there shall be no abandonment without permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission as defined in that section.

B. The Decisions of this Court Confirm that Commission Approval Pursuant to Section 7(b) is a Mandatory Prerequisite to Abandonment.

This Court has consistently held that abandonment of certificated natural gas service can be effected only upon compliance with the provisions of Section 7(b). As early as its decision in *Atlantic Refining Co.* v. *Public Service Commission of New York,*[21] this Court held that once a gas supply is dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval." [22] In *United Gas Pipe Line Co.* v. *FPC,*[23] this Court held that for abandonment, "[t]he statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped." [24] In its

---

[21] 360 U.S. 378 (1959).

[22] *Id.* at 389.

[23] 385 U.S. 83 (1966).

[24] *Id.* at 89.

recent decision in *Southland Royalty, supra,* the Court held:

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of 'any service rendered by means of such facilities."[25]

The reason for the Court's consistent adherence to this principle is clear. The Commission's authority to permit or withhold abandonment has always been recognized as a key element in the "comprehensive and effective regulatory scheme"[26] established by the Natural Gas Act. For example, in *Sunray Mid-Continent Oil Co.* v. *FPC, supra,* this Court held that the Commission was empowered to require producers to accept certificates of unlimited duration as a condition to their commencing to sell gas in interstate commerce. The Court reasoned that if natural gas companies were able to limit the duration of the service obligation they undertook, it would undermine the Commission's authority to control the terms of that service. It was essential for the Commission to be able to ensure that natural gas producers could not cease certificated service except on the terms provided in Section 7(b).

In *Sunray,* this Court addressed the very issue that has arisen in this case—the effect of the depletion of gas supply upon the Section 7(b) abandonment obligation of the holder of a certificate of unlimited duration:

> It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.*[27]

The holding of the court below is in direct conflict with this conclusion.

Thus, the apparent depletion of reserves does not automatically effect a lawful abandonment. Instead, it is for the Commission to determine upon a proper showing—with opportunity for all interested parties, including the purchasers, to be heard—that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the public convenience or necessity permits the abandonment. As the Court stated in *Sunray,* in discussing pipeline certificates:

> From the fact that the Commission has issued certificates in the presence of what may prove to be physical limitations on the service to be rendered under them, it does not follow that the Commission cannot take care lest these physical problems in the continuation of supply become further complicated by the legal certificate term limitations for which the petitioner contends.[28]

By the same token, the fact that all the gas reserves on the dedicated acreage will eventually be depleted does not justify bypassing the Commission's authority to determine whether abandonment is warranted at any given time. A producer, of course, operates under

---

[25] 436 U.S. at 527.

[26] Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520 (1947).

[27] 364 U.S. at 158 n. 25 (emphasis added).

[28] *Id.* at 158 (footnote omitted). The omitted footnote is footnote 25 set out in the text above.

the same certificate and abandonment requirements and constraints as a pipeline; the producer can no more lawfully abandon service without meeting the Section 7(b) requirements than can a pipeline.

In *Southland Royalty, supra,* the Court held that abandonment authorization was necessary before deliveries of gas in interstate commerce could cease despite the expiration of the lease of the producer to whom the certificate had been issued. The decision emphasizes the importance attached by this Court to insuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." [29]

In short, this Court has made it clear that Section 7(b) is a key provision in the regulatory structure established by the Natural Gas Act, because it is Section 7(b) that assures that no certificated interstate natural gas service is abandoned without the Commis-

[29] 436 U.S. at 524. Other decisions of lower courts are in accord with this Court's in holding that Section 7(b) Commission approval is necessary for abandonment. *E.g.,* Reynolds Metals Co. v. FPC, 534 F.2d 379, 384-85 (D.C. Cir. 1976); Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co., 349 F.Supp. 670, 677 (D. Neb. 1972), *aff'd,* 486 F.2d 315 (8th Cir. 1973); J. M. Huber Corp. v. FPC, 236 F.2d 550, 558 (3d Cir. 1956), *cert. denied,* 352 U.S. 971 (1957).

Of special relevance is Mitchell Energy Corp. v. FPC, 533 F.2d 258 (5th Cir. 1976), which held that gas from reservoirs not known to exist at the time of the original certificate was nevertheless dedicated to interstate commerce and subject to the Section 7(b) abandonment requirements. The decision below, in holding that the deeper reservoirs were not subject to the Section 7(b) abandonment requirements, is in conflict with *Mitchell Energy.* The fact that in *Mitchell Energy* the new production was discovered before the original production ceased, rather than afterwards, has no logical bearing on the question whether a Section 7(b) Commission proceeding is a prerequisite to release of the deeper reserves from commitment to interstate commerce.

sion's express approval.[30] Accordingly, this Court's decisions have made it clear that the Section 7(b) requirements are mandatory. The lower court's ruling, which holds to the contrary, is in conflict with these decisions.

II. The Decision Below Invades the Commission's Jurisdiction and Undermines the Commission's Authority to Administer the Natural Gas Act Effectively.

The court below held that the Section 7(b) requirements can be bypassed when the known facts make it appear that there is no more gas available from a particular tract. However, the statute expressly allocates to the Commission—not the courts—the responsibility to make the factual determination under which an abandonment will be permitted. As Judge Holloway pointed out in his dissent, the majority holding is "di-

[30] As noted in Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. at 141-42, Section 7(b) of the Natural Gas Act "follows a common pattern in federal utility regulation." Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), similarly provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Like the decisions under Section 7(b), the decisions under this provision uniformly hold that strict compliance with the statutory requirements is necessary to effect an abandonment and that only the Commission may in the first instance determine whether an abandonment is consistent with the present or future public convenience and necessity. Smith v. Hoboken R.R., Warehouse & S.S. Connecting Co., 328 U.S. 123, 129-30 (1946); Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 144-46 (1946); ICC v. Chicago, R.I. & Pac. R.R., 501 F.2d 908, 913-14 (8th Cir. 1974), *cert. denied,* 420 U.S. 972 (1975); Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958); ICC v. Baltimore & A. R.R., 398 F.Supp. 454, 461 (D.Md. 1975), *aff'd,* 537 F.2d 77 (4th Cir.), *cert. denied,* 429 U.S. 859 (1976).

rectly contrary to the plain terms of § 7(b)." (App. 34.)

> It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does the determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b).[31]

The majority opinion of the court below undermines the Commission's authority to control the terms and conditions upon which gas producers may terminate certificated natural gas service. For in the view of the court below, the cessation of production from the known reserves on dedicated acreage would automatically result in an abandonment—and hence, the termination of the Commission's jurisdiction—without any finding or approval by the Commission. This would seriously impair the Commission's ability to carry out its statutory responsibility of assuring "an adequate and reliable supply of gas at reasonable prices." [32] The Commission would be left without the means to confirm that the producer did all that was required to maintain production from the old reserves. Similarly, the Commission would be denied the opportunity to determine how likely or unlikely was the possibility of production from the deeper horizons in light of geo-

[31] App. 35 (emphasis in original).

[32] California v. Southland Royalty Co., 436 U.S. at 523.

logical information available at the time production from the shallow reserves ceased.[33]

The majority opinion of the court below seems to assume that if an abandonment application had been brought after the old reservoirs ceased to produce but before the new production was established, the Commission would have been compelled to authorize abandonment. But this is not so. A similar situation was recently before the Commission in *Texaco, Inc., et al.*, FERC Docket Nos. G-8820, *et al.* There the Commission refused abandonment because the producer did not show that the lease had been explored to a point

[33] The court below quoted extensively (App. 27-29) from the opinion it had previously withdrawn. The excerpts quoted, although not part of the court's holding, contain the suggestion that abandonment was effected under Section 7(b) when the Secretary of the Commission sent certain letters to the producers. The letters themselves, which were never made part of the record, are set out in their entirety in the Appendix. (Pet. App. 97-98, 100-01.) These letters can in no way be construed as an authorization for abandonment. First, each of the letters expressly states that the producer must file an application and follow the Commission's other required procedures in order to obtain abandonment. Second, even if by some construction the letters could be viewed as authorizing abandonment, this would be entitled to no legal effect. It is well established that actions by the Secretary of the Commission are not binding; rather, only the institutional decisions of the agency —*i.e.*, decisions by a majority vote duly taken—are entitled to legal significance. Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146 (1946) (action by Secretary of Interstate Commerce Commission not binding upon the Commission); Minneapolis & St. Louis R.R. v. Peoria & Pekin Union Ry. Co., 270 U.S. 580, 585 (1926) (action by Chairman of Interstate Commerce Commission not binding upon the Commission); Public Serv. Comm'n of New York v. FPC, 543 F.2d 757, 776-77 (D.C. Cir. 1974) (only institutional decisions of Federal Power Commission entitled to legal significance). Finally, the letters do not even approach fulfillment of the hearing and finding requirements of Section 7(b).

such that a definitive finding could be made that no additional gas reserves could be expected to be found through further exploratory efforts.[34] In holding that the cessation of production in and of itself effected abandonment, the court below would preclude the Commission from considering the possibility of production from deeper but untested reservoirs in making its determination under Section 7(b) whether "the available supply of natural gas is depleted."

Since the producers never sought Commission abandonment authorization here, the Commission never had the chance to make any evaluation whether the reserves were in fact exhausted or whether there might be additional reservoirs at lower depths. As the Administrative Law Judge noted in his Initial Decision (App. 15), there was "no assurance that abandonment, if applied for in 1966, would have been granted or unopposed." Indeed, because there now *is* production from deeper reservoirs, it is clear that the lease was *not* exhausted in 1966. It is indeed ironic that the court below relied heavily upon the assumption that the Commission would have been compelled to make a finding that is now known to be incorrect.

In any event, Section 7 (b) expressly charges the *Commission* with the responsibility of determining whether "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." By making its own finding on abandonment, the court below not only impermissibly usurped the Commission's responsibility expressly conferred under Section 7(b), but it also exceeded the

[34] Order Granting Petition for Reconsideration and Modifying Prior Order, issued November 1, 1977, mimeo at 3.

bounds of its reviewing authority under Section 19(b) of the Act.[35]

If allowed to stand, the decision of the court below would create considerable uncertainty as to whether abandonment of particular acreage has occurred or not. Abandonment would not be dependent upon a Commission order—a readily identifiable point of reference—but upon the actual or assumed depletion of the dedicated reserves. It would often be unclear whether a particular set of facts resulted in abandonment. For example, the court below emphasized the five-year period that had elapsed between the date of the last production from the shallow reserves and the new production from the deeper horizons. If this is a factor, it introduces an additional element of uncertainty, since it is unclear how long the interval must be before the abandonment is effected.

Moreover, the lower court's decision deprives other parties (*e.g.,* pipeline purchasers and gas consumers) of the right to be heard in determining whether abandonment should be granted. Indeed, the power to effect abandonment would be to a large extent within the control of the producer. This is contrary to the mandate of Section 7(b) and the decisions of this Court.

[35] FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-34 (1976). This decision shows the limitations on the role of the reviewing court under Section 19(b) of the Natural Gas Act. If the court believes that the Commission's decision is not sustainable on the record, it may vacate it and remand the case for additional consideration. For a court to go beyond this, however, and to engage in its own fact-finding constitutes an abuse of its reviewing authority and an attempt by the court "to exercise an essentially administrative function" within the domain Congress has set aside exclusively for the agency. *Id.* at 333-34. *See also,* FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

III. The Natural Gas Policy Act of 1978 Shows A Clear Congressional Understanding and Intent That The Category of Gas Involved Here Is and Shall Remain Subject To The Requirements of Section 7(b) Of The Natural Gas Act.

In enacting the Natural Gas Policy Act of 1978 (the "NGPA"),[36] Congress evidenced its clear understanding that mere cessation of production from dedicated acreage does not effect an abandonment under Section 7(b) of the Natural Gas Act. Moreover, Congress manifested an intent that where, as here, the successors in interest to the person who originally dedicated the gas to interstate commerce still control the lease, the gas shall remain fully subject to the requirements of Section 7(b) of the Natural Gas Act.

Section 601(a)(1)(A) [37] of the NGPA affirmatively removes from the jurisdiction of the Commission under the Natural Gas Act that gas which was not "committed or dedicated to interstate commerce" on the day before the date of enactment of the NGPA, *i.e.*, on November 8, 1978. The term "committed or dedicated to interstate commerce" is defined generally in Section 2(18) [38] of the NGPA as any gas which would be required to be sold in interstate commerce under the terms of any contract, any certificate under the Natural Gas Act, or any provision of the Act. However, the definition excludes gas which was not being sold in interstate commerce on May 31, 1978 if on that date neither the person who caused the gas to be dedicated to inter-

---

[36] Pub. L. No. 95-621, 92 Stat. 3350 (1978).

[37] *Id.* § 601(a)(1)(A). The full text of this provision is set out in the appendix to this brief at p. 4a.

[38] *Id.* § 2(18). The full text of this provision appears in the appendix to this brief at pp. 2a-3a.

state commerce nor any successor in interest to that person had any right explore for, develop, produce or sell such natural gas.[39] Thus, if sales in interstate commerce from particular dedicated acreage had ceased prior to May 31, 1978 and if the lease had reverted to the landowner by that date, future gas production from the acreage will not be subject to the Natural Gas Act.[40]

This exclusion from the definition would have little or no meaning if the result reached by the court below were correct. If abandonment were effected upon termination of production from known reserves, future gas production from that acreage would be free from the requirements of the Natural Gas Act without the new statutory enactment.

Moreover, in enacting the NGPA, Congress made clear a positive intent that gas previously certificated *shall* remain subject to the Natural Gas Act if either (a) the gas was being sold in interstate commerce on May 31, 1978, or (b) the person who caused the gas to be dedicated to interstate commerce or any successor in interest to that person had any right to explore for, develop, produce or sell such gas on May 31, 1978. Since the owners of the Butler B leasehold interest, *e.g.*, the McCombs Group, are the successors in interest of the person who originally dedicated the gas, Bee Quin, the Butler B lease does not fall within the exclusion of the

---

[39] *Id.* § 2(18)(B)(iii).

[40] The Conference Reports accompanying the NGPA state that the purpose of the exclusion is to limit the extension of this Court's decision in *Southland Royalty, supra,* but that *Southland* is not reversed on its facts. H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 71-72 (1978); S. Rep. No. 95-1126, 95th Cong., 2d Sess. 71-72 (1978). The full text of the pertinent portion of the reports appears in the appendix to this brief at pp. 4a-7a.

definition of gas "committed or dedicated to interstate commerce." Instead, it falls within that category of gas which Congress clearly intended should remain subject to the Natural Gas Act.

The evidence of this Congressional intent is not mere inference from the limitation on the exclusion from the NGPA definition, although that in itself is clear enough. Congress made its intent explicit in its Conference Reports accompanying the NGPA where it explained the effect of Section 2(18)(B)(iii):

> Several examples may be helpful. Seller A commits natural gas to interstate commerce in 1950. On May 31, 1978, Seller B, Seller A's successor in interest, has the right to explore for, develop, produce, or sell such natural gas. *The natural gas remains committed or dedicated to interstate commerce.*[41]

Thus, Congress was clear and explicit in indicating its intent that gas such as that involved here shall remain subject to the Natural Gas Act.

The statement in the Conference Report is no mere advisory opinion by a Congress that had nothing to do with the enactments that define the scope of the Natural Gas Act. In the Natural Gas Policy Act of 1978, Congress had under consideration the questions raised by this Court's decision in *Southland Royalty* and the extent to which producers' prior dedications to interstate commerce should be terminated or continued. Sections 2(18)(B)(iii) and 601(a)(1)(A) of the NGPA represent a considered determination by Congress of the extent to which gas previously dedicated to interstate commerce should remain subject to the provisions of the Natural Gas Act. Accordingly, the views of the 95th Congress are entitled to the weight normally accorded the expression of intent of the Congress enacting the controlling provision of law.[42]

[41] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 72 (1978); S. Rep. No. 95-1126, 95th Cong., 2d Sess. 72 (1978) (emphasis added).

IV. A *Nunc Pro Tunc* Abandonment Order Would Be Erroneous Because It Would Bypass The Requirements of Section 7(b) Of The Natural Gas Act and Because It Would Be Contrary To The Facts Of This Case.

In the proceedings before the Commission the McCombs Group asked that abandonment of the Butler B reserves be ordered *nunc pro tunc* as of 1966.[43] The Commission correctly refused to do so in light of the fact that the reserves were not depleted.[44] In its oppo-

[42] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); Glidden Co. v. Zdanok, 370 U.S. 530, 541 (1962).

[43] The McCombs Group's request for *nunc pro tunc* abandonment must be interpreted as merely a request for retroactive abandonment rather than for application of the judicial doctrine of *nunc pro tunc*. The *nunc pro tunc* doctrine permits courts to enter orders having retroactive effect for the limited purpose of correcting a previously entered order which contained an error, omission, or a mistake. Gagnon v. United States, 193 U.S. 442 (1904); Brignardello v. Gray, 1 Wall. 627 (1864); Matthies v. Railroad Retirement Board, 341 F.2d 243 (8th Cir. 1965); W. F. Sevell Co. v. Hessee, 214 F.2d 459 (10th Cir. 1954).

[44] The McCombs Group's argument for retroactive abandonment depends upon the contention that if abandonment had been sought in 1966, it would have been routinely granted. But this is by no means clear. As stated by the Presiding Administrative Law Judge in his Initial Decision (App. 15):

> Respondents argue that the Commission should do now what should have been done in 1966, and authorize abandonment *nunc pro tunc*. There is no assurance that abandonment, if applied for in 1966, would have been granted or even unopposed. In any event, it is now clear that the deeper reserves

sition to certiorari the McCombs Group construed the Court of Appeals decision as a holding that the Commission had erred as a matter of law in failing to authorize the abandonment retroactively.[45]

The McCombs Group is incorrect in arguing that it is permissible to side-step the requirements of Section 7(b) of the Natural Gas Act by characterizing the decision of the court below as a direction to the Commission to enter an order *nunc pro tunc* authorizing abandonment as of 1966. This action would have exactly the same effect as the *de facto* abandonment theory of the court below and would be subject to the same objections. In either case the Commission would be deprived of exercising its Section 7(b) authority and the other parties would be deprived of their right to be heard on the issue of abandonment.

The power of administrative agencies to enter orders having retroactive effect is one that is to be sparingly invoked [46] and used only when the result is consistent with the statutory design intended by Congress.[47] Here

underlying the Butler B tract were not depleted (there was no evidence either way in 1966).

The Judge was sustained by the Commission in Opinion No. 740. (Pet. App. 31 n. 25.)

[45] The basis of the McCombs Group's opposition to certiorari was the argument that the decision of the court below should be read as having corrected the producers' "good faith" failure to file an abandonment application by directing the Commission to enter an abandonment order *nunc pro tunc* on the ground that the facts as they appeared in 1966 would have justified the Commission in entering such an order at that time.

[46] Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 160 (D.C. Cir. 1967).

[47] SEC v. Chenery Corp., 332 U.S. 194 (1947).

a *nunc pro tunc* abandonment would undermine Congress' purpose in creating a "comprehensive and effective regulatory scheme" [48] for interstate natural gas sales by circumventing the Commission's authority to control the abandonment of dedicated reserves. Any effort to insulate the McCombs Group from the effects of the failure of their predecessors in interest to file for abandonment must be rejected in order to avoid "the mischief of producing a result which is contrary to a statutory design . . . ." [49] Indeed, a retroactive abandonment here would have the effect of placing the burden for failure to comply with the Section 7(b) requirements, not upon the producers who omitted to invoke them, but upon the interstate consumers for whose protection they were enacted.

The cases cited by the McCombs Group are not in point. In *Plaquemines Oil & Gas Co.* v. *FPC* [50] and *Niagara Mohawk Power Corp.* v. *FPC* [51] the regulated pipeline and power plants had failed to apply for the certificates and licenses required by the Natural Gas Act and Federal Power Act, respectively, even though the Commission had asserted jurisdiction over the parties several years earlier. In both cases the Commission applied the relevant regulatory standards to the noncomplying party from the date of the Commission's assertion of jurisdiction as if the party had properly sought the Commission's approval of its actions at that time.

[48] Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 520 (1947).

[49] SEC v. Chenery Corp., 332 U.S. at 203.

[50] 450 F.2d 1334 (D.C. Cir. 1971).

[51] 379 F.2d 153 (D.C. Cir. 1967).

In both *Plaquemines* and *Niagara Mohawk,* the action which the Commission implied on the part of the regulated parties was the act of submitting to the jurisdiction of the Commission, since this was essential to the effective operation of the regulatory scheme created by Congress. Had the Commission not applied the Acts retroactively as if the parties had acted in compliance with the mandates of Congress, the regulatory scheme would have been thwarted. In contrast, the retroactive application of Section 7(b) sought here would terminate the Commission's jurisdiction and, in so doing, frustrate the purposes of the Act.

The final case relied upon by the McCombs Group as authorizing the retroactive application of the Act adds no further support to their argument. In *Highland Resources, Inc.* v. *FPC,*[52] the court determined that Highland's failure to make the proper filing was due to its reliance on the published standards of the Commission concerning what action was required of producers in its situation. In light of these circumstances, the court held that the Commission should give retroactive effect to Highland's application to avoid an inequitable result.

Quite the opposite situation is presented in the instant case. On two occasions following the termination of production from the Butler B lease, the Secretary of the Commission sent letters to the McCombs Group's predecessors informing them that if no further sales of gas were contemplated it would be necessary to file applications for abandonment.[53] Although invited to do

[52] 537 F.2d 1336 (5th Cir. 1976).

[53] (Pet. App. 97, 100.) The August 1968 and January 1971 letters from the Commission are not part of the record. They were, however, considered in the decision of the court below. (App. 28-29.)

so, the producers chose not to file for abandonment. *Highland Resources* is therefore inapposite to the McCombs Group's request for retroactive application of the Act.

Moreover, all three cases cited by the McCombs Group involve situations where the action given retroactive effect was correct in the light of facts as they appeared at the later date. This is not true here. Abandonment authorization would not be appropriate unless the Court ignores the fact that the reserves on the Butler B lease are not exhausted. The retroactive entry of an order known to be erroneous is not justified on the supposition that the order would have been entered at some past date because the true situation was not then known.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed and the case remanded with directions (i) to affirm the Commission's determination that the gas from the Butler B lease is dedicated to interstate commerce and (ii) to dispose of the remaining issues in the appeal in accordance with that principle.

Respectfully submitted,

W. DeVier Pierson
Knox Bemis
James M. Costan
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

Counsel for Petitioner
United Gas Pipe Line Company

Of Counsel:

Michelle B. Bolton
United Gas Pipe Line Company
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Pierson Semmes Crolius and Finley
1054 Thirty-first Street, N.W.
Washington, D.C. 20007

November 24, 1978

APPENDIX

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1976):

(b) *Review of Commission order*

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court

such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Section 2(18) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 2(18), 92 Stat. 3350 (1978):

SEC. 2. DEFINITIONS.

For purposes of this Act—

. . . .

(18) *Committed or Dedicated to Interstate Commerce.*—

(A) *General Rule.*—The term "committed or dedicate to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) *Exclusion.*—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 601(a)(1)(A), 92 Stat. 3350 (1978):

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) *Jurisdiction of the Commission Under the Natural Gas Act.*—

(1) *Sales.*—

(A) *Natural gas not committed or dedicated.*—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act solely by reason of any first sale of such natural gas.

Excerpt from House and Senate Conference Reports* on the Natural Gas Policy Act of 1978. H. R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 71-72 (1978); S. Conf. Rep. No. 95-1126, 95th Cong., 2d Sess. 71-72 (1978):

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE ON CONFERENCE

. . . .

Committed or dedicated to interstate commerce

The term committed or dedicated to interstate commerce, for purposes of this Act, means natural gas sold from the Outer Continental Shelf and most natural gas which, if sold, would be required to be sold in interstate commerce within the meaning of the Natural Gas Act. The definition is intended by the conferees to clarify any uncertainty re-

*The conference reports for the House and the Senate are identical.

sulting from recent court decisions as to what natural gas may qualify under what price categories in Title I of this Act, and what natural gas may qualify for non-price deregulation in Title VI of this Act.

The term does not apply to:

(A) natural gas sold in interstate commerce—

(1) under sec. 6 of the Emergency Natural Gas Act of 1977;

(2) under a limited term certificate with a pregrant of abandonment of service pursuant to sec. 7 of the Natural Gas Act;

(3) under any emergency sale pursuant to sec. 7(c) of the Natural Gas Act; and

(4) to the user by the seller and transported under a certificate granted pursuant to sec. 7(c) of the Natural Gas Act;

(B) natural gas for which abandonment of service was granted on or before the date of enactment under sec. 7 of the Natural Gas Act; and

(C) natural gas which would be committed or dedicated pursuant to the above criteria by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(1) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(2) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in (A) (1), (2), or (3) above).

The conferees intend that the term "successor in interest" shall exclude any interest owner who acquires his right pursuant to the reversion or any other termination of a natural gas leasehold interest, or any subsequent grantee of such interest owner who acquires his interest after the date of such reversion or other termination.

The exclusion described in paragraph (C) above limits further extension of the holding of the Supreme Court in *California et al.* v. *Southland Royalty Co. et al.* (Slip Opinion No. 76-1114, decided May 31, 1978). The case is not, however, reversed on its facts.

Under the exclusion, certain natural gas is not to be considered committed or dedicated, if such natural gas is committed or dedicated by reason of the action of any person and neither that person (or any successor in interest thereof) nor any affiliate, on May 31, 1978, had any right to explore for, develop, produce, or sell such natural gas. If the right to explore is vested in any other person by means of any reversion of a leasehold, such other person is not to be considered a successor in interest, and thus the natural gas would not be considered committed or dedicated, unless the gas is also sold in interstate commerce (within the meaning of the Natural Gas Act) for resale on May 31, 1978.

Several examples may be helpful. Seller A commits natural gas to interstate commerce in 1950. On May 31, 1978, Seller B, Seller A's successor in interest, has the right to explore for, develop, produce, or sell such natural gas. The natural gas remains committed or dedicated to interstate commerce.

Seller C is a lessee, who commits natural gas under a leasehold interest to interstate commerce in 1950. In 1971, the lease reverts to Seller D, and Seller D terminates the sales in interstate commerce. No natural gas from the lease is sold in interstate commerce for resale on May 31, 1978. Such natural gas is excluded from the definition of committed or dedicated. However, if Seller D had sold such

natural gas in interstate commerce for resale on May 31, 1978, such natural gas would be committed or dedicated under the definition.

With respect to natural gas from the Outer Continental Shelf that is not subject to a certificate of public convenience and necessity under the Natural Gas Act on the date of enactment, the term "committed or dedicated to interstate commerce" is used solely for the purpose of the pricing and other provisions of this Act. This definition does not create new freestanding obligations or expand the jurisdiction of the Commission under the Natural Gas Act.